IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 16 OF 2002

State of Goa. ... Appellant

versus

1. Dilip J. Naik.

2. Shivanand J. Naik.
Both residents of
Savoi Verem. ... Respondents

Mrs. Winnie Coutinho, Additional Public Prosecutor for the Appellant/State.

Mr. Ranjit D. Satardekar, Advocate for Respondent No.1.

Mr. S. G. Bhobe, Advocate for Respondent No.2.

CORAM : SMT. NISHITA MHATRE &
P. V. HARDAS, JJ.

DATED : 14TH JANUARY, 2004.

ORAL JUDGMENT(PER P.V.HARDAS,J.)

The State assails the Judgment of the learned Sessions Judge, Panaji, dated 29th August, 2001, in Sessions Case No.10 of 1996, acquitting the

Respondents/Accused of offence punishable under Section 302 r/w Section 34 of the Indian Penal Code.

2. The facts in brief as are necessary for the decision of the Appeal are set out hereunder:-

On 19th November, 1995, P.W.16, P.S.I. Uttam Raut Desai, was informed at 2.15 a.m. by P.S.I. Tamse regarding the murder at Savoi Verem. Pursuant to the said message, P.W.16, P.S.I. Uttam Raut Desai, rushed to the Police Station and recorded the complaint of P.W.1, Vijaya V. Shinde at Exh.11. On the basis of the said complaint, an offence vide Crime No.317/95 under Section 302 r/w 34 of the Indian Penal Code came to be registered against both the Respondents. Meanwhile, P.S.I. Tamse, had posted the Police guard at the scene of offence. Respondent No.2/Accused No.2 had come to the Police Station and he was arrested. Respondent No.1/Accused No.1, came to be arrested at 4.30 a.m. on the same day. At 6.00 a.m., P.W.16, P.S.I. Uttam Raut Desai, conducted the Inquest Panchanama of the dead body in the presence of P.W.7, Devidas Sukhthankar. The Inquest Panchanama is at Exh.38. The Inquest Panchanama was of Narayan @ Babu Vithal Shinde. The scene of offence panchanama at Exh.40 also came to be drawn in the presence of P.W.7, Devidas Sukhthankar. From the scene of offence

panchanama, broken pieces of soda water bottle which were stained with blood and mud came to be attached. Services of P.W.7, Devidas Sukhthankar, were requisitioned for taking the photographs of the scene of offence. The dead body of Narayan was sent for post mortem examination to the Goa Medical College, Bambolim. The post mortem on the dead body of Narayan was conducted by P.W.3, Dr. Silvano Dias Sapeco, who noticed the following injuries:-

1. Incised punctured stab wound of 3.5 x 3 cms was present on right side at outer front of neck placed obliquely. The outer end of this wound was 8 cms above the mid point of right collar bone and 8 cms from mid line at the level of second tracheal ring. The depth of the stab wound was 4 cms through which the deeper tissues of the neck namely outer part of the right sterno cleidomastoid muscle at its level and the carotid artery and the internal jugular vein were cut at their floor with blood oozing out.

2. An obliquely vertical superficial incised wound of 2.8 x 8 cms was seen at the right supra clavicular fossa with lower end on mid point of right collar bone.

3. An incised wound of 6 x 1 cms was seen placed vertically at right supra clavicular fossa 7 cms above the junction of

middle third with outer third of right collar bone. Margins are clean cut. The wound is deeper at upper part with subcutaneous tissue and shallow at upper part with tailing downwards.

4. An incised wound of 4.5 cms placed obliquely vertical on front of right shoulder with margins clean cut, dermal deep at the upper part and gradually shallowing at lower part with tailing downwards.

5. Contused lacerated wound of 1 x 0.3 cms with bruising of 4 x 2 cms around bridge of nose.

6. A railroad patterned bruise of 6 x 1 cms with reddish in colour was seen placed horizontally on the right outer part of chest.

7. Abrasion of 1 x 1 cms were seen at back of left heel.

8. A railroad patterned bruise, reddish in colour of 21 x 1.3 cms was seen at right lower back of abdomen in the lumbar region.

9. A grazed abrasion of 11 x 9 cms. on the lower back of left side of chest.

10. A railroad patterned bruise, red in colour of 6 x 1 cms was seen on outer back of left arm, placed horizontally.

11. A railroad patterned bruise, red in colour of 21 x 1 cms was seen on back of left side chest over left shoulder blade placed horizontally.

12. A railroad patterned bruise, red in colour of 10 x 1 cms was seen on back of right side chest over right shoulder placed horizontally.

13. Bruise, red in colour of 7 x 6 cms on back of left hand at the level of middle to the little finger.

14. A scab separating healing abrasion of 1 week's duration of 5 x 2.5 cms was seen at lower outer part of right side of abdomen along its flank.

3. In respect of Injury No.1, P.W.3, Dr. Silvano Dias Sapeco, opined that it was caused by sharp cutting and penetrating weapon. In respect of Injury Nos.2 to 4 Dr. Sapeco opined that they were caused by sharp cutting weapon. In respect of Injury No.5, according to P.W.3, Dr. Sapeco, it was caused by blunt force of object impact. Injury Nos.6, 8, 10 to 13 were caused by hard and blunt force of object impact. Injury Nos.7, 9 and 14 were caused by blunt surface impact. On internal examination, it was found that Injury No.1 had cut the right internal jugular vein and right carotid artery by 1 cm each. He, therefore, opined that death was due to haemorrhage and shock as a result of Injury No.1.

4. Accused No.2, Shivanand Naik, during his interrogation, disclosed that he would point out the place where the weapon of assault was kept. This

statement was allegedly made in the presence of P.W.6, Shamim Ibrahim Khan. The panchanama to this effect is at Exh.35. The Accused is alleged to have taken the panch and the Police to the house of the deceased and in the garden in front of the house a broken bottle was picked up by the Accused and handed over to the Police. The said broken bottle is M.O.4. On the next day i.e. on 20th November, 1995, the clothes of the deceased were brought from the Goa Medical College by Police Constable Naik and the same came to be attached vide Attachment Panchanama at Exh.47 in the presence of P.W.11, Mahesh G. Panshekar. The shirt of the deceased is M.O.5 and the red colour pant is M.O.7. At the time of the arrest of the Accused, the clothes came to be attached vide Exh.49 in the presence of P.W.12, Vilas Mandrekar. On 26th November, 1995, Accused No.1 is alleged to have made a statement in the presence of P.W.7, Devidas Sukhthankar, that he would point out the place where he had hidden the stick. Accordingly, vide panchanama at Exh.41, a stick from the fencing came to be attached at the instance of Accused No.1. The said stick is M.O.9.

5. The Accused had been sent for medical examination. Accused No.1 was examined by P.W.2, Nilind Sukhthankar, who has issued the Hurt Certificate at Exh. 18(a). Accused No.2 was examined by P.W.3,

Dr. Silvano Dias Sapeco, who had found the following injuries:-

1. A soft to hard scabbed area on right parietal region of scalp.

2. Contusion of 3 cms diameter with soft scabbed area of 2 1/2 cms diameter on left side of forehead.

3. A hard and soft scabbed area of 5 cms diameter on left cheek.

4. Soft scabbed areas were seen on knuckles of right hand fingers.

5. The left upper limb appeared diffusely swollen along left elbow and forearm regions with 3 railroad patterned reddish brown areas each of 7 x 2 cms, 5 x 2 cms. and 7 x 2 cms. with soft scab on.

6. Dorsum of left wrist had soft scab on for 3 x 3 cms area.

7. Right axilla and shoulder along back had soft scabbed area of 6 x 3 cms.

8. Left shoulder back region had soft to hard scabbed area of 11 x 7 cms.

9. The patient complained of pain along left loin and lower limb with deep tenderness and had a limping gait.

6. Accused No.2 was also examined by P.W.3, Dr. Silvano Dias Sapeco, who had noticed that Accused No.2

had soft scabbed nail imprint marks on right shoulder front in an area of 6 x 4 cms as well as at right back of chest at shoulder blade region which were 1 to 3 days from the date of the examination on 20th November, 1995. In respect of Injury No.9 of Accused No.1, it was found to be grievous in nature vide Report at Exh.26 as there was fracture of the left iliac bone. Further to the completion of the investigation, a charge-sheet against the Respondents came to be filed. Thereafter, on 3rd July, 1996, after the filing of the charge-sheet, P.W.16, P.S.I. Uttam Raut Desai, recorded the statement of P.W.10, Prakash Shinde.

7. After committal of the case to the Court of Sessions, the learned Sessions Judge, vide Exh.5, framed a charge against the Respondents for an offence punishable under Section 302 r/w 34 of the Indian Penal Code. The Respondents denied their guilt and claimed to be tried. The prosecution examined 16 witnesses in support of its case. The defence of the Accused as, is revealed from the Statement under Section 313 of the Code of Criminal Procedure was that the deceased had given a blow of the stick on the head of the Accused No.1 and as a result of which he became unconscious. On learning about the infliction of the injury on Accused No.1, Accused No.2 rushed to the scene of the offence and found his brother Accused No.1 lying

unconscious. He brought a bottle of soda for reviving A1. Deceased Narayan did not permit him to give soda to A1 and thereafter deceased Narayan grappled with Accused No.2 as a result, both of them fell on the ground and in the process the soda water bottle broke, possibly causing injury to Narayan. The learned Trial Court acquitted the Accused principally on the ground that the evidence of the eye witnesses namely P.W.1, Vijaya V. Shinde, P.W.4, Anita Shinde, P.W.10, Prakash Shinde and P.W.13, Umesh Verenkar, apart from being inconsistent on the material aspects of the incident, was self destructive as acceptance of the evidence of either P.W.13, Umesh Verenkar, would render the evidence of P.W.1, Vijaya V. Shinde, P.W.4, Anita Shinde and P.W.10, Prakash Shinde doubtful and acceptance of evidence of P.W.1, Vijaya V. Shinde and P.W.4, Anita Shinde would render the evidence of the other witnesses doubtful. The learned Trial Court also found that the prosecution had suppressed the genesis of the incident and as such had acquitted the Accused by giving them the benefit of doubt. The State being aggrieved by the acquittal has filed the present Appeal assailing the Judgment of acquittal.

8. Mrs. Winnie Coutinho, learned Additional Public Prosecutor appearing on behalf of the Appellant/State has urged before us that the reasoning

of the learned Trial Court for rejecting the testimony of the eye witnesses is perverse and unsustainable. It is, therefore, urged that the prosecution has proved the offence against the Respondents beyond reasonable doubt.

9. Mr. S. G. Bhobe, learned Counsel appearing on behalf of Respondent No.2 and Mr. Ranjit D. Satardekar, learned Counsel appearing on behalf of Respondent No.1 have submitted before us that the testimony of the eye witnesses is replete with inconsistency on the vital aspects of the prosecution case and to a large extent the versions given by each defers from the version of the others and thus, no reliance whatsoever can be placed on such testimonies. The learned Counsel have, therefore, urged that the Appeal filed by the State be dismissed.

10. The pivot of the prosecution case is the testimony of the eye witnesses. The eye witnesses are P.W.1, Vijaya V. Shinde, P.W.4, Anita Shinde, P.W.10, Prakash Shinde and P.W.13, Umesh Verenkar. P.W.1, Vijaya V. Shinde, states that on 18th November, P.W.9, Jayprakash Verenkar, had come and informed deceased Narayan that they would go out together for joining the palaquin procession. Deceased Narayan took a mat and was lying in the chowki of the house. After some time,

P.W.4, Anita Shinde, wife of P.W.5, Anil Shinde(brother of deceased) informed P.W.1, Vijaya V. Shinde, that the deceased was being assaulted. On hearing this, P.W.1, Vijaya V. Shinde, came out of the house and saw that Accused No.1, Dilip J. Naik, was assaulting deceased Narayan with a stick(danda). He was giving continuously danda blows on the deceased. She shouted for help pleading for someone to intervene but no person came forward to intervene and, therefore, she ran to the house of the Sarpanch. According to her, deceased Narayan in the meantime started running towards the house of Accused No.1, Dilip J. Naik, stating that he would go and complain to the mother of the Accused regarding the assault by Accused No.1, Dilip J. Naik. Deceased Narayan at that time was bleeding profusely from the nose. Accused No.1, Dilip J. Naik, gave threats stating that he would kill the deceased. P.W.1, Vijaya V. Shinde, then further states that she saw Kamali, mother of Accused No.1 and Manda was sister of Accused No.1 accompanying the deceased and going towards her house. As deceased Narayan was about to enter his house, Accused No.1, Dilip J. Naik, caught hold of the deceased by both his hands while the mother of Accused No.1, Dilip J. Naik, caught the deceased by his hair and then Accused No.2, Shivanand J. Naik, gave a blow of broken bottle on the neck of the deceased. On receiving the injury,

deceased Narayan fell down at the entrance of his house. Deceased Narayan is alleged to have informed P.W.1, Vijaya V. Shinde, that the injury had been inflicted by Accused No. 2, Shivanand J. Naik. After the arrival of the Police, she was taken to the Police Station and while she had gone to answer the call of nature she had seen Accused No.1, Dilip J. Naik, been brought inside the Police Station with a stick(danda) in his hand. Her complaint at Exh.11 came to be recorded. In the cross-examination, she has admitted that Accused No.1, Dilip J. Naik, used to some time visit her house and used to also watch television in her house. Accused No.2, Shivanand J. Naik, also used to visit and watch television along with the children. Since deceased Narayan was going out to witness the palaquin procession, he was sleeping in the chowki. P.W.5, Anil Shinde, was sleeping inside while P.W.10, Prakash Shinde, was in the company of deceased Narayan. She further states that when she came out of the chowki she had also seen P.W.10, Prakash Shinde, with deceased Narayan. She has admitted that the incident between Accused No.1, Dilip J. Naik and deceased Narayan lasted for about 1/2 an hour and it was in the chowki itself. She has further stated in the cross-examination that the mother and the sister of the Accused had also caught hold of the deceased. She further states that when Accused No.2, Shivanand J.

Naik, reached the scene of offence she was in the house and not on the road. She has further stated that she had not seen deceased Narayan in any manner assaulting Accused No.1, Dilip J. Naik, when Accused No.1, Dilip J. Naik was assaulting him with a stick. According to her, before Accused No.1, Dilip J. Naik, caught hold of the hair of the deceased Accused No.2, Shivanand J. Naik, had given a blow of broken bottle on his neck. According to her, Accused No.2, Shivanand J. Naik, had also hit deceased Narayan with either an iron wire or a belt. According to her, Accused No.2, Shivanand J. Naik, had broken a bottle on a stone near the house and had then dealt a blow with it on deceased Narayan. Certain omissions were brought out in the cross-examination that she had not stated in her complaint about the mother of the Accused catching hold of the deceased by his hair. She has also admitted not to have stated about the sister of the Accused catching hold of deceased Narayan. She has admitted not to have stated that Accused No.1, Dilip J. Naik, had caught hold of the deceased while the blow was dealt by Accused No.2, Shivanand J. Naik. She has also admitted not to have stated about deceased Narayan informing her that he had been hit by Accused No.2, Shivanand J. Naik. She has denied the suggestion that on the day of the incident, deceased Narayan was heavily drunk and in that drunkenness had assaulted

Accused No.1, Dilip J. Naik and had rendered him unconscious. She has also denied the suggestion that on learning that Accused No.1, Dilip J. Naik, had fallen down, Accused No.2, Shivanand J. Naik, came running and was sprinkling soda water on Accused No.1, Dilip J. Naik. She has further denied the suggestion that deceased Narayan thereafter started assaulting Accused No.2, Shivanand J. Naik and threw him on the stone which was by the road side and in tbat process a bottle in the hand of Accused No.2, Shivanand J. Naik, fell on the ground and broke. She has further stated in the cross-examination that Accused No.2, Shivanand J. Naik, had dragged and brought the dead body of deceased Narayan to the main door of his house.

11. P.W.4, Anita Shinde, sister-in-law of deceased Narayan, states that on the day of the incident, her husband P.W.5, Anil Shinde, returned at 11.00 p.m. She served food to her husband and she was preparing to retire to bed. At that time, she heard the noise of a quarrel between Accused No.1, Dilip J. Naik and the deceased Narayan and, therefore, she woke P.W.1, Vijaya V. Shinde. P.W.1, Vijaya V. Shinde, then went to the chowki along with P.W.4, Anita Shinde and P.W.1, Vijaya V. Shinde, asked Accused No.1, Dilip J. Naik, as to what had happened. The deceased Narayan then is alleged to have stated that Accused

No.1, Dilip J. Naik, had removed a ring from his finger and was not returning the ring. Accused No.1, Dilip J. Naik, then removed a stick from the fencing of the courtyard and gave a blow of it on the nose of deceased Narayan. The deceased Narayan started bleeding and went running to show it to the mother of Accused No.1, Dilip J. Naik. P.W.4, Anita Shinde, further states that P.W.10, Prakash Shinde, was also present at the scene of offence. Accused No.1, Dilip J. Naik, threw some pebbles on them and threatened that he would show them. There was also a scuffle between Accused No.1, Dilip J. Naik and P.W.10, Prakash Shinde. One Umo informed the incident to Accused No.2, Shivanand J. Naik and Accused No.2, Shivanand J. Naik came there armed with a whip. Accused No.2, Shivanand J. Naik, gave a kick on the door of the chowki and started asking for the deceased. He was told by P.W.4, Anita Shinde and others that the deceased had gone to the mother of the Accused to show the injury inflicted by the Accused. Accused No.2, Shivanand J. Naik, is alleged to have stated that after the return of the deceased, he would kill him. At that time, the deceased accompanied by Kamali, mother of Accused No.1, Dilip J. Naik and Manda, sister of Accused No.1, Dilip J. Naik were seen coming. When the deceased reached the courtyard, Accused No.2, Shivanand J. Naik, caught hold of him

and started assaulting him with a whip. The mother of the deceased caught hold of the deceased and Accused No.1, Dilip J. Naik, had embraced the deceased and Manda was pulling the legs of the deceased. Accused No.2, Shivanand J. Naik, continued to assault the deceased with a whip and when they went to intervene they were pushed away. At that time, Accused No.2, Shivanand J. Naik, went to a nearby hotel and came with a soda water bottle in his hand and broke the soda water bottle on a stone and then pierced the broken bottle on the neck of the deceased. The deceased started bleeding profusely from the wound and Accused No.2, Shivanand J. Naik, threw him on the ground and ran away. P.W.5, Anil Shinde, went to inform the Sarpanch but he was not available. The deceased was then taken to the hospital. In the cross-examination, she has stated that initially during the quarrel between Accused No.1, Dilip J. Naik and the deceased some people had gathered outside the house but she was not able to give the names. During the fight, Accused No.1, Dilip J. Naik, used to fall down because he was heavily drunk and he used to soon get up. The entire incident lasted for half an hour. She has further stated that during the entire incident P.W.1, Vijaya V. Shinde, was at the scene of the offence. She has further stated that she did not see Accused No.1, Dilip J. Naik, lying flat on the ground but as he was

heavily drunk he used to fall and get up. According to her, the deceased had returned after half an hour of his going to the house of the mother of the Accused to show the injury. According to this witness, the mother and sister of the Accused were also assaulting the deceased when Accused No.2, Shivanand J. Naik, had gone to bring the soda water bottle. According to her, in the chowki itself Accused No.2, Shivanand J. Naik, had inflicted the injury by means of the broken bottle. She has stated that the stone where Accused No.2, Shivanand J. Naik, broke the bottle was by the side of the fencing. According to her, Accused No.1, Dilip J. Naik, had thrown a stick which was used by him as he left the scene and she had seen before the Police arrived there. She further states that she had shown the stick to the Police. An omission was brought out regarding P.W.1, Vijaya V. Shinde, asking what had happened and the deceased stating that Accused No.1, Dilip J. Naik, had removed the ring from his finger. She has denied to have stated to the Police that the deceased had removed a stick from his compound fence to assault Accused No.1, Dilip J. Naik. When confronted with the portion, she was unable to state as to why it was recorded. She was also confronted that she had not stated that the deceased had sustained a blow on the nose on account of the stick wielded by Accused No.1, Dilip J. Naik. She has also confronted that she had

not stated that the deceased had gone to show the injury sustained by him to the mother of the Accused. An omission was also brought out in respect of Accused No.2, Shivanand J. Naik, stating that he would kill the deceased on his return. An omission was also brought out in respect of Manda, sister of the Accused coming to the scene and pulling the legs of the deceased. Similarly, an omission was also brought out in respect of the mother of the Accused catching the deceased by his hair. An omission was also brought out in respect of Accused No.1, Dilip J. Naik, catching the deceased while Accused No.2, Shivanand J. Naik, delivered a blow. She was unable to explain as to how it was scribed in the statement that the deceased had come to the veranda followed by Accused No.2, Shivanand J. Naik.

12. P.W.10, Prakash Shinde, whose statement came to be recorded after 237 days, states that on the day of the incident, he asked deceased Narayan as to why he was sleeping outside and deceased Narayan told him that his friend Jayprakash would come and that they would both go to the temple. At about 11.00 a.m., Accused No.1, Dilip J. Naik, who was under the influence of liquor came to the scene. Accused No.1, Dilip J. Naik, asked deceased Narayan as to why he was sleeping there. As deceased Narayan got up Accused No.1, Dilip

J. Naik, pushed him with his hand. Deceased Narayan asked him as to why he was pushing him. Accused No.1, Dilip J. Naik, then removed a bamboo stick from the fencing and then removed the gold ring from deceased Narayan's finger. Deceased Narayan then said that he would show the injury to the mother of the Accused and then went to inform. Accused No.1, Dilip J. Naik, then pretended and fell down outside the veranda. Accused No.2, Shivanand J. Naik, came there with a "Vailock" and asked him as to where the deceased was and kicked the door of the house. Accused No.2 said that he would kill the deceased. Seeing Accused No.1, Dilip J. Naik, lying on the ground Accused No.2, Shivanand J. Naik, went to a hotel and returned with a soda water bottle. Thereafter, the mother of the Accused and the sister of the Accused and the deceased came to the house. When they reached the house, Accused No.2, Shivanand J. Naik, held the soda water bottle in one hand and the Vailock in the other hand and hit the deceased two or three times by the Vailock. When P.W.10, Prakash Shinde, intervened, Accused No.2, Shivanand J. Naik, hit the said Vailock on his back and ear. The deceased received about 5 to 6 strokes of the said Vailock. As a result of the assault deceased Narayan fell down and the mother and sister of the Accused caught hold of the hair of deceased Narayan and Accused No.1, Dilip J. Naik, got up and caught hold of

the legs of deceased Narayan. The deceased was dragged upto the stones of the fence and Accused No.2, Shivanand J. Naik, broke the soda water bottle and pierced the bottle on the left side throat of deceased Narayan. Thereafter, Accused No.2, Shivanand J. Naik, lifted deceased Narayan and dragged him and brought him inside the veranda. He then told his sister-in-law to bring water and poured some water in the mouth and deceased Narayan is alleged to have stated that Accused No.2, Shivanand J. Naik, had pierced a piece of glass. Deceased Narayan died thereafter. In the cross-examination, it is admitted that Accused No.1, Dilip J. Naik, continued to remain at the scene of offence where he had fallen when Accused No.2, Shivanand J. Naik, had come to the place. He has further stated that when Accused No.2, Shivanand J. Naik, came with a soda water bottle and Vailock, his mother and sister-in-law were inside the house. He has further stated that when the bottle was broken by Accused No.2, his mother and sister-in-law were inside the house. According to him, deceased Narayan was dragged from the road upto the stones and was assaulted there first with the Vailock. He has admitted that his statement was recorded by the Police on 3rd July, 1996. On the day of the incident, Police had come to their house. He has admitted that he had sent a message to the Police that his statement be recorded. He had sent

a message after two or three months after the incident. He has been confronted with the statements made by him in his Statement under Section 313 of the Code of Criminal Procedure. The said contradictions refer to the fact that there was a scuffle between the deceased and the Accused. He has denied to have stated that the Accused removed a bamboo stick after the scuffle. He denied to have stated that Accused No.2, Shivanand J. Naik, brought a soda water bottle and splashed the contents on Accused No.1, Dilip J. Naik. He has admitted to have stated that Accused No.1, Dilip J. Naik, had fallen near their house. An omission was brought out that he had not stated regarding the threat held by Accused No.2, Shivanand J. Naik. He has denied to have stated that Accused No.2, Shivanand J. Naik, caught hold of deceased Narayan and threw him on the door.

13. P.W.13, Umesh Verenkar, states that on the day of the incident, he was sitting in the company of deceased Narayan and Accused No.1, Dilip J. Naik, had come to the scene and thereafter started abusing the deceased. The deceased gave a slap on the face of Accused No.1, Dilip J. Naik. Thereafter, deceased Narayan pulled Accused No.1, Dilip J. Naik, towards the road and there was a scuffle between them. In the scuffle, Accused No.1, Dilip J. Naik, was thrown on

the ground and deceased Narayan pulled a stone from the fence and hit the same four or five times on the back of Accused No.1, Dilip J. Naik. Accused No.1, Dilip J. Naik, fell unconscious and, therefore, he went to the house and informed Accused No.2, Shivanand J. Naik. Accused No.2, Shivanand J. Naik, came to the scene and told P.W.13, Umesh Verenkar, that he would bring a soda water bottle and sprinkle soda on the face of Accused No.1, Dilip J. Naik. As Accused No.2, Shivanand J. Naik, was coming with a soda water bottle, deceased Narayan caught hold of Accused No.2, Shivanand J. Naik and pushed him towards the fence. Accused No.2, Shivanand J. Naik, was holding the soda water bottle. This witness has further stated that he does not know what happened thereafter. He has further stated that at the time of the fight, Accused No.1, Dilip J. Naik, had fallen down unconscious and only Accused No.2, Shivanand J. Naik, deceased Narayan and he were present.

14. The learned Trial Court has disbelieved P.W.10, Prakash Shinde, as a statement was recorded after a delay of 237 days. The prosecution has not given any probable explanation for the delay in recording the statement. The name of P.W.10, Prakash Shinde is also not disclosed in the F.I.R. at Exh.11.

The learned Trial Court has disbelieved the evidence of the other eye witnesses namely P.W.1, Vijaya V. Shinde and P.W.4, Anita Shinde, on the ground that there were discrepancies in the evidence of these two witnesses on material aspects of the case. The learned Trial Judge also found that P.W.13, Umesh Verenkar, had given a completely different version and the prosecution had not declared P.W.13, Umesh Verenkar hostile with the result that the prosecution could not wish away the testimony of P.W.13, Umesh Verenkar. The situation was such that accepting the evidence of either P.W.1, Vijaya V. Shinde, P.W.4, Anita Shinde or P.W.13, Umesh Verenkar, necessitated the rejection of the evidence of the other witnesses. This was a case where the truth and falsehood was so extravagant that it was difficult to separate the grain from chaff and, therefore, the learned Trial Court jettisoned the evidence of all the four witnesses.

15. The learned Additional Public Prosecutor appearing on behalf of the Appellant/State has urged before us that the discrepant versions are not on vital aspects of the prosecution case and, therefore, can be termed as mere "embroidery" which should not entail the rejection of the testimony of the witnesses. Thus, according to the learned Additional Public Prosecutor

appearing on behalf of the Appellant/State, the prosecution evidence was sterling in quality and deserved acceptance.

16. Mr. S. G. Bhobe, learned Counsel appearing for Respondent No.2 has urged before us that the view taken by the learned Trial Court is a possible view on the basis of the record. The discrepancies inter se between the evidence of the witnesses are on vital aspects of the prosecution case that is the discrepancies are in relation to the infliction of the injuries on the deceased. The discrepancies are also in the manner in which the assault took place. He has further urged that each eye witness has given a different version and placing reliance on any one witness necessarily entails the rejection of the other.

17. The evidence of the witnesses which have been referred to us in detail above, fairly indicates that P.W.1, Vijaya V. Shinde, P.W.4, Anita Shinde, P.W.10, Prakash Shinde and P.W.13, Umesh Verenkar have all given different versions. The point of differences in their testimony are not on peripheral matters of the incident but relate to the core of the incident. It is true that the evidence of no two witnesses can ever be

identical and to expect identical versions from the witnesses is not a realistic approach. However, where there are discrepant versions of the witnesses on the vital aspects of the prosecution case, the Court can draw an inference that the witnesses were not present at the scene of the offence which they claimed to be present. In the present case, acceptance of the evidence of any one witness necessarily entails the rejection of the evidence of the other witnesses on account of the discrepant versions of the incident. In fact, according to P.W.10, Prakash Shinde, neither P.W.1, Vijaya V. Shinde nor P.W.4, Anita Shinde, were present when the alleged injury is inflicted to deceased Narayan. If, P.W.13, Umesh Verenkar, is to be believed then neither P.W.1, Vijaya V. Shinde, P.W.4, Anita Shinde nor P.W.10, Prakash Shinde were present. The First Information Report at Exh.11 filed by P.W.1, Vijaya V. Shinde, does not at all refer to the presence of P.W.10, Prakash Shinde. The delay in recording the statement of P.W.10, Prakash Shinde, adversely affects his claim in being an eye witness. It is impermissible for the prosecution to reconstruct a completely new case by picking bits and pieces from the evidence of the witnesses whose testimony, if accepted, is destructive to the testimony of the other

witnesses. The learned Trial Judge, therefore, according to us, has not committed any perversity in the appreciation of the evidence.

18. In respect of the recovery of the stick, according to us, no weight can be given as the witnesses have admitted that the stick was at the scene of the offence and was brought by the Accused at the scene of the offence. The seizure of the piece of the broken bottle at the behest of Accused No.2, Shivanand J. Naik, also does not inspire confidence. It was seized at the scene of the offence and there is nothing in the evidence to show that the bottle was hidden and was not visible at the time of drawing the scene of offence panchanama. In any event, mere seizure of the broken pieces of the bottle at the instance of the Accused cannot crop up the otherwise infirm of the prosecution case.

19. The learned Trial Court has given the benefit of doubt and has acquitted the Accused. The view of the learned Trial Court is a possible view on the basis of the evidence on record and we see no reason to interfere with the acquittal recorded by the learned Trial Court.

20. Accordingly, Criminal Appeal No. 16 of 2002 is dismissed.

SMT. NISHITA MHATRE, J.

P. V. HARDAS, J.

RD.